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AN ADDRESS BEFORE

THE MINNESOTA STATE BAR ASSOCIATION

AT DULUTH

JULY 19, 1911

BY

GEORGE W. WICKERSHAM

ATTORNEY GENERAL OF THE UNITED STATES

WASHINGTON, D. C.
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Gentlemen of the Minnesota State Bar Association:

One of the most important questions—perhaps *the* most important—before the country to-day is that of the proper relation of the national government to corporations engaged in carrying on commerce among the states and with foreign countries. The Sherman anti-trust law was held applicable to railroad companies in 1897, but the Interstate Commerce law of 1887 and the various amendments to it, particularly the Elkins law of 1903, the Hepburn act of 1906, and the Mann-Elkins law of 1910, have dealt so comprehensively and effectively with common carriers by railroad, express, pipe line, telegraph, telephone, and to a certain extent by water, that but few civil suits have been brought against such carriers under the Sherman act, and—so far as I am aware—no criminal indictments have been found for violation of its provisions by railroad companies or other carriers. The gradual interpretation of the act of July 2, 1890, resulting in the decisions and decrees rendered by the Supreme Court at its last term, has at last clearly demonstrated the effectiveness of that law to destroy existing combinations in restraint of interstate or international commerce and attempts to monopolize any part of it, and to prevent renewed combination or monopolistic effort.

The first practical application of the "rule of reason," to combinations in violation of the anti-

trust law, made since the Supreme Court decisions in the Standard Oil and Tobacco cases, was that of the United States Circuit Court for the Third Judicial Circuit, in the Government's suit against the so-called Powder Trust.* Certainly, no person interested in the maintenance of any monopoly or other restraints of interstate commerce, can derive comfort from the stern demonstration of unlawful combination contained in the court's opinion in that case, or in the impending doom foreshadowed in its decree.

> "The recent decisions of the Supreme Court in Standard Oil Co. *v.* United States, and American Tobacco Co. *v.* United States," says Judge Lanning in rendering the opinion of the Court, "make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than inhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common law restraint of trade. * * *
>
> "While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation

*United States *v.* E. I. du Pont de Nemours & Co., et al, decided June 21, 1911, U. S. Cir. Ct., Dist. of Delaware.

> of the anti-trust act merely by the form it assumes or by the dress it wears. It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce and monopolizes or attempts to monopolize a part of that commerce in a sense that violates the anti-trust act."

In determining the form of decree to be entered, the Court said that the relief which it proposed to give was preventive and injunctive.

> "If our decree, limited to that purpose, shall necessitate a discontinuance of present business methods, it is only because those methods are illegal. The incidental results of a sweeping injunction may be serious to the parties immediately concerned, but, in carrying out the command of the statute, which is as obligatory upon this Court as it is upon the paties to this suit, such results should not stay our hand; they should only challenge our care that our decree be no more drastic than the facts of the case and the law demand. * * * The present decree will therefore be interlocutory. It will adjudge that the 28 defendants are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of Section 1 of the anti-trust act, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved. * * *"

The decree further provided that in order that the Court might obtain such further information as should enable it to frame a final decree which should give effective force to its adjudication, a hearing should be given the parties in October next "as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination," the defendants being enjoined in the meantime from doing any acts to further extend or enlarge the field of operation or the power of the unlawful combination.

Therefore, within such time as the ascertainment of facts and the preparation of evidence necessary to the initiation and conduct of appropriate proceedings by the Government may require, such of the known monopolistic combinations in restraint of interstate trade and commerce as shall not voluntarily dissolve, will be brought before the Courts for judgment, and the precedents furnished by the Standard Oil, Tobacco and Powder cases afford some assurance of the results which may be anticipated.

But the question remains, can the great end and object of the Sherman law—namely, that the normal course of trade and commerce among the states shall not be impeded by undue restraints and monopolies—be realized through the operation of that law alone?

In dealing with transportation, Congress was not content to reply simply on the process of injunction to restrain, and indictment to punish violations

of the anti-trust law. It also established an Administrative Commission clothed with powers—greatly enlarged from time to time—over those engaged in the transportation business, which Congress enacted should be carried on for a reasonable compensation and without unjust discrimination as between parties or localities similarly situated. While Congress has not specifically incorporated corporations to carry on such business—save in a very few instances—nor directly licensed them to engage in interstate transportation, nor expressly exempted them from state interference, the Federal Courts have substantially held that Congress by regulating the rates and practices of common carriers in interstate commerce, has prohibited state regulation which would conflict with that of the nation. The decisions of the Federal Courts on this subject have not been always consistent, and in some instances state legislation has been allowed effect, despite apparent conflict with federal regulation of the same subject. But in the absence of direct Congressional exclusion of state law, or an avowed direct and exclusive license system, or system of national incorporation, the Courts have very properly considered the susceptibilities of the states, and have upheld state legislation whenever it seemed to be not destructive of national control over the essentials of interstate commerce.

A more frankly logical system would be, of course,

more satisfactory; but Congress—in common with other legislative bodies—is apt to shrink from taking a clear logical position in legislation which may involve conflict with other sovereignties or quasi-sovereignties, and to leave judicial interpretation to add to statutory authority a power the legislature was desirous to confer but feared to express.

There are many reasons why a similar attitude may be expected when Congress comes to deal with the difficult problem of regulating the conduct of large commercial businesses among the states by corporations.

The existing system, whereby every state charters corporations without the slightest regard to other states, or to the nation, empowered to roam at will—so far as their creator is concerned—but subject to any restriction or condition which any other state into which they may desire to go in carrying on their business chooses to impose, naturally led to a demand for authority in one corporation to take and hold stock in another, in order that the business of a corporation organized in one state might be carried on in another state, without subjecting the parent company and its entire capital and corporate organization to the laws of the latter. Probably no one thing has done more to facilitate restraint of trade and the growth of monopoly than the departure from the early rule of law that one corporation cannot own stock in another. That departure was the most

baneful result of the *laissez faire* policy in dealing with corporations to which the country abandoned itself during the last thirty years of the nineteenth century. The conditions which have resulted from the exercise of the expressly conferred power in one corporation to take and hold stock in another, present the most serious obstacles to effectively dealing with the "trust" problem. For few, if any, corporations, solely by means of the direct acquisition of property and the widening scope of their own business, have acquired such control of the particular commerce among the states with which they are concerned as to constitute monopoly, or to threaten it. Whenever competitors have been excluded by unfair means, and a very large part of the commerce absorbed by a particular interest, the machinery by which such result has been accomplished will be found on examination to be the control of various corporations by means of intercorporate stock holdings.

The cases of the Standard Oil, American Tobacco, the Powder Company, the American Sugar Refining Company, and others, furnish abundant judicial demonstration of this fact.

In a large number of cases it has been sought to perpetuate the control secured by one corporation through the acquisition of stocks of other corporations, by pledging such stocks as security for issues of notes or bonds; and enormous amounts of securi-

ties have been sold to the public in faith of such pledges.

If Congress should enact that no corporation engaged in interstate commerce shall hereafter acquire any stock of any other corporation so engaged, and that unless all such corporations should dispose of all stocks held by them in other corporations engaged in interstate commerce within some specified period they should be prohibited from carrying on interstate commerce until they did so dispose of such stocks, the axe would indeed be laid at the root of the trust evil; but justice to the innocent holders of securities issued to the public based on pledged stocks acquired and held pursuant to express legal authority, would require consideration to be given to their case, and such exceptions to be made from the prohibition as might be necessary to their protection. These necessary acts of justice might seriously interfere with the enactment of legislation effective to the accomplishment of the main purpose in view.

But such drastic legislation, while logical and effective, is hardly to be expected, and the question will therefore remain: Within what limits is legislation to regulate corporations engaged in interstate commerce other than transportation expedient and practicable? Should the analogy of the Interstate Commerce law and Commission be followed? Is *any* regulatory legislation necessary besides the

Sherman act and the statutes prohibiting railroad rebates?

Conservative minds naturally shrink from accepting a conclusion which would devolve upon the national government the comprehensive powers and duties involved in extending the principles of the Interstate Commerce laws over commercial and industrial corporations, for the increased centralization of control in Washington over the trade of the country, the multiplication of federal office holders and bureaucratic intermeddling with business, may be necessary, but are undesirable incidents to the conduct of daily business life.

In deciding an act to provide for the purchase of a site and for the erection of a state elevator or warehouse at Duluth, for the public storage of grain, etc., to be in contravention of a constitutional prohibition against the state contracting any debts for works of public improvement, or to be a party in carrying on such work, one of the greatest of your Minnesota judges—William Mitchell—said:

> "The time was when the policy was to confine the functions of government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that the country is governed the best that is governed the least. At present, the tendency is all the other way, and toward socialism and paternalism in government. This tendency is, perhaps, to some extent, natural,

> as well as inevitable, as population becomes more dense, and society older, and more complex in its relations. The wisdom of such a policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government, it is their right to do so. But in order to do it they must amend the constitution of the state. The present constitution was not framed on any such lines."*

But the general power of the state to regulate business affecting the public was expressly recognized by Judge Mitchell in this language:

> "The right of the state, in the exercise of its police power, to regulate the business of receiving, weighing, inspecting, and storing grain for others, in elevators or warehouses, as being a business affected with a public interest, is now settled beyond all controversy. This power extends even to fixing the charges for such services. * * *
>
> "And where a business is a proper subject of police regulation, doubtless, the legislature may, in the exercise of that power, adopt any measures they see fit, provided only they adopt such as have some relation to, and have some tendency to accomplish, the desired end; and if the measures adopted have such relation or tendency the courts will never assume to determine whether they are wise, or the best that might have been adopted."†

That some further regulation over corporations carrying on commerce among the states may be

*Rippe *v.* Becker, 56 Minn., 100, 118.

†Id., p. 108.

necessary, is a matter of current comment. It has been openly advocated by representatives of some of the largest combinations of capital, perhaps as a means of salvation, and to preserve under government supervision, great organizations whose continued existence is menaced by the recent interpretation of the Sherman Act, and the disintegration of which would be necessarily attended with much loss. To such it is a case of "any port in a storm." Better continued co-operative life, even under a powerful master, than disseminated properties and segregated activities without constant governmental supervision.

But there are other reasons for such regulation. The Federal Department of Justice is not organized or equipped to maintain constant supervision and control over business organizations. It deals only with cases of violation of the law. The activities of an administrative board or commission would be directed to preventing such violations, and in aiding business men to maintain a continued status of harmony with the requirements of law.

Moreover, unless Congress shall provide for the establishment of corporations drawing their life and powers only from the national government, and subject only to its control, or shall confer specific powers on state corporations which will enable them to carry on commerce away from the state of their creation, without the interference of states into which they go, the present unsatisfactory condition

of carrying on business in the different states by means of many different corporations owned or controlled through stock ownership by a parent company created by some one state will continue, and in the natural, normal, healthy and legitimate growth of such business, questions of the application of the Sherman law must arise which cannot be properly settled with the District Attorney or the Department of Justice, but which should be dealt with by an administrative body having appropriate jurisdiction.

There are still further considerations involved in the question. The tendency of this age is toward co-operation in every field of activity. The early form of co-operative business effort by means of partnerships was found insufficient for large enterprises, because of the unlimited liability imposed on the partners, and the inelastic character of the investment. The great commercial development of the country would scarcely have been possible but for the introduction of co-operation in the form of corporations for business purposes in the early part of the nineteenth century. The growth of the incorporated companies, the development of close relations between them by agreement, and through reciprocal stock ownership, so unified their power and extended their control that their employees were driven to co-operative association for protection against the suppression of their rights, and for the purpose of compelling better recognition of their claims to larger

recognition in the division of profits. The problems of modern commercial life are vast. They affect not only employer and employed, but the public. Facilities of transportation and for the transmission of intelligence have brought all parts of the world into close touch. Any economic disturbance in one part of the country affects to a greater or less extent every other part of the country. Common needs have developed, and commodities of many kinds are standardized. Prices should be reasonable. Destructive competition, while it is attended with abnormally low prices never produces *reasonable* prices. Indeed, abnormal price is one of the *indicia* of monopoly. Fair competition is essential to healthy national life, but it is more than doubtful whether or not there can be fair competition without concert of action or co-operative effort to some extent. Business men of integrity are naturally desirous of avoiding violations of law. The construction of the Sherman law originally contended for would have condemned them for any concerted action which imposed any restraint on trade. The more enlightened view which has been expressed by the Supreme Court limits the prohibition to *undue* restraints—those which are not the result of normal business methods, but which are intended to accomplish, or have for their direct and primary purpose, interference with the natural course of trade and commerce among the states or with foreign countries. Yet even within these rules there

is an area of activity where co-operation and association should only have play under government supervision and control.

With such supervision, a natural economic force may be utilized to the public benefit and to the general satisfaction of the commercial world. By it, while monopolies and restraints of trade will still be held at bay by the terrors of the anti-trust act, thousands of small traders may by regulated co-operation protect themselves from the ruin of destructive competition on the one-hand, and from the constant apprehension of indictment on the other.

Whether or not such a Federal Industrial Commission should have power to regulate prices, is of course a matter for serious consideration. The Interstate Commerce law prescribes as a legislative rule that prices for transportation by rail, or wire, or pipe line, shall be reasonable, and that no unjust discrimination shall be made between individuals or localities similarly situated. It leaves it to the Commission to determine when this legislative standard is departed from and to take proceedings appropriate to compel compliance with it. A similar rule might be declared by Congress with respect to the prices of commodities the subject of interstate commerce.

We have become accustomed to the regulation of rates of transportation, but the suggestion that prices of commodities be regulated by Congress seems novel and radical. Yet the principle on which the

regulation of transportation rates is based is simply that when property is used in a manner to make it of public consequence and affect the community at large it becomes clothed with a public use, and may be controlled by the public for the common good. In the early days in some parts of this country statutes were enacted to regulate the business of millers and the rates they might charge for grinding. At that time it was a matter of public concern that every farmer should have the right to have his corn ground at a reasonable rate. So to-day the conduct of the great commerce in staple articles among the states is become a matter of public consequence, and the courts have upheld legislation regulating it by prescribing some of the conditions under which it may be carried on. To require as one of these conditions that prices for commodities dealt in in interstate commerce must be reasonable, only involves a new application of the same principle.

Indeed, unless prices be dealt with under such a law, it would fail to reach the essential evil; for "unified tactics with regard to prices" has been authoritatively declared to be the essence of modern monopoly, and as was said in the case of *National Cotton Oil Co.* v. *Texas* (197 U. S. 115–129), "It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them." But again, it is said that legislative control of prices

smacks of medieval sumptuary legislation and is foreign to the genius of our institutions. Students of Adam Smith are taught to believe that the natural price of an article is that which is fixed by the operations of the natural unrestrained law of supply and demand, working without any artificial restraint. The anti-trust legislation of the United States and of most of the states is based upon this theory. It is said in "The Wealth of Nations:"

> "The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion, indeed, but for any considerable time together."*

But the fact is that the law of supply and demand does not and has not for many years worked in this country in a natural unrestrained and unfettered manner. The government, in the first instance, interposes an artificial restraint in the protective tariff on imports. True, the theory of this tariff is to equalize conditions of competition; to place, as it were, a handicap on the foreign competitor who has produced his commodities under conditions less burdensome than those under which the American manufacturer produces his. But, in fact, the inequalities resulting from the methods of tariff legislation are very often impossible to justify on the theory of

*Ed. Geo. Bell & Co., London and New York, 1896, Vol. I, p. 62.

sufficient protection only, and the resulting price is that fixed by a limited competition between dealers in the market from which foreign competitors are to a certain extent excluded. Nor is this all: It is probably safe to say that in almost every one of the great staple industries, prices have been for years fixed by agreement between the principal producers, and not by the normal play of free competition, even among the domestic producers, nor by the unfettered operation of the law of supply and demand.

Take, for instance, the facts concerning the powder and explosive business, as found by the United States Circuit Court in the recently decided case to which I have already referred.

"The record of the case now before us" said Judge Lanning in that case "shows that from 1872 to 1902, a period of thirty years, the purpose of the trade associations had been to dominate the powder and explosives trade in the United States, by fixing prices, not according to any law of supply and demand, for they arbitrarily limited the output of each member, but according to the will of their managers. It appears, further, that although these associations were not always strong enough to control absolutely the prices of explosives, their purpose to do so was never abandoned. Under the last of the trade association agreements—the one dated July 1, 1896, and which was in force until June 30, 1904—the control of the combination was firmer than it had before been. Succeeding the death of Eugene du Pont in January, 1902,

> and the advent of Thomas Coleman du Pont and Pierre S. Du Pont, the attempt was made to continue the restraint upon interstate commerce and the monopoly then existing by vesting, in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association. *That attempt resulted in complete success.*"

For years, the Court said, trade agreements between all manufacturers of powder and explosives in the United States have been in existence. There were times when the parties to these agreements broke away from and disregarded them, but usually the fines and penalties imposed on the violators were effective to protect and effectuate them. The Court says:

> "On October 26, 1897, an agreement was entered into by ten American manufacturers, eight of whom were parties to the agreement of July 1, 1896, and two European manufacturers, which related to explosives of all kinds, provided that the European parties should not complete works then building in New Jersey, and that the American parties should bear all expenses theretofore incurred in connection therewith, contained mutually restraining provisions as to the erection of factories in the United States and

> Europe, divided the trade of the world territorially between the American and the European parties, contained provisions for fixing prices, provided a fund for the purpose of protecting the common interest against outside competition, fixed fines and penalties for breaches of the agreement, and contained sundry other provisions for the regulation and control of the trade. This agreement was in existence throughout the period of the war with Spain and until 1906."

It was succeeded, as shown by the first quotation from the opinion, by a more perfect combination, by which prices were absolutely fixed and which continued to the time of the decree.

A large number of indictments recently found in the Southern District of New York were based upon evidence of the continued existence during a number of years, and until a recent date, of pools, or associations of manufacturers of various kinds of wire, under which official and noncompetitive prices were fixed, determined, agreed upon, and maintained.

The fact seems to be, that the prices of many standard articles of consumption sold in the United States for a number of years past have not been fixed at all by the operation of the laws of supply and demand or by unrestrained competition, but by associations of the producers, without the participation of the consumer or the general public—that is, without those who have had to pay the bill having any voice in fixing the price. In this view, it is certainly not unreasonable that the purchasing public should desire

to have some part in determining the price it is to pay—in like manner as has been recognized to be just with respect to the cost of transportation.

If there could be any assurance that the free play of competition would be assured, and the natural price resulting from the unrestrained operation of supply and demand maintained, then no governmental supervision of business—beyond occasional prosecutions for violations of the Sherman law—would be necessary. But the habits formed through years of following a system are not easily shaken off, and the artificial forms of organizations made necessary by the conflicting laws of many states with those of the nation, will always present a border land of doubt, which will furnish, on the one hand, opportunities for those who wish to violate the law to do so with some show of justification; and on the other, to perplex those who are sincerely desirous of keeping the law, but by reason of the complexity and conflict of different state laws, find it difficult to do so without seeming to run counter to the anti-trust law. For the effectual regulation of both of these classes the supervision of a federal commission is certainly desirable, if not absolutely necessary.

In theory it would seem that such a commission should have some power over prices, but the practical difficulties in the way of exercising such power so as not to inflict a greater evil than that it is intended to cure, are so great as perhaps to be insurmountable

It would be well nigh impossible to fix a maximum price which would not be, on the one hand unjust to the small producer, and would not on the other hand increase unduly the profit of the large producer. For the large producer with an adequate supply of raw material and the economies and efficiencies only possible with a large organization, can always afford to sell at prices which would be ruinous to the small producer.

These problems go to the very root of the continued prosperity of our people. They can only be solved by a careful consideration free from any partizan bias. I have not attempted to express a conclusion, but merely to state the elements of a problem which if wisely determined, will "scatter plenty o'er a smiling land," and if unwisely dealt with may paralyze the hand of industry that maketh rich—not with the unequal wealth of monopoly, but with the distributed wealth which brings national prosperity and continued peace.

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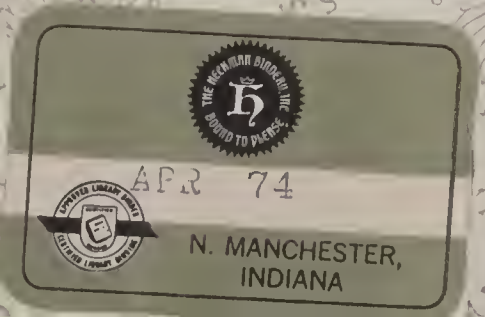

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